(10) (10)

Nos. 93-762 & 93-1094

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JEROME B. GRUBART, INC.,
Petitioner,
v.
GREAT LAKES DREDGE & DOCK COMPANY,
Respondent.

CITY OF CHICAGO,
Petitioner,
v.
GREAT LAKES DREDGE & DOCK COMPANY and
JEROME B. GRUBART, INC.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER CITY OF CHICAGO

THEODORE R. TETZLAFF
RICHARD C. BOLLOW
RUSS M. STROBEL
JEFFREY T. SHAW
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

MICHAEL F. STURLEY
727 East 26th Street
Austin, Texas 78795
(512) 471-6318

SUSAN S. SHER
Corporation Counsel of
the City of Chicago
LAWRENCE ROSENTHAL *
Deputy Corporation Counsel
BENNA RUTH SOLOMON
Chief Assistant Corporation
Counsel
BOBBIE MCGEE GREGG
Chief Assistant Corporation
Counsel
STUART D. FULLERTON
Assistant Corporation Counsel
Room 610 City Hall
Chicago, Illinois 60602
(312) 744-5337
Attorneys for Petitioner
City of Chicago
* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

25 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

Nos. 93-762 and 93-1094

JEROME B. GRUBART, INC.,
Petitioner,
v.
GREAT LAKES DREDGE & DOCK COMPANY,
Respondent.

CITY OF CHICAGO,
Petitioner,
v.
GREAT LAKES DREDGE & DOCK COMPANY and JEROME B. GRUBART, INC.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER CITY OF CHICAGO

I. FEDERAL ADMIRALTY JURISDICTION SHOULD BE RECOGNIZED ONLY WHEN A FEDERAL INTEREST IN PROTECTING MARITIME COMMERCE IS PRESENT.

We explain in our opening brief that when a tort on a vessel causes land-based injury to a nonmaritime party, admiralty jurisdiction should not preempt the traditional state power to adjudicate such cases unless preserving state jurisdiction would interfere with the federal interest in protecting maritime commerce. See Chicago Br. 28-32. While Great Lakes does not dispute that the rights and liabilities of land-based parties not engaged in maritime activities are normally governed by state law, it maintains that "[t]he plain language of the Admiralty Extension Act . . . makes that fact irrelevant to juris-

dictional analysis" because the Extension Act provides for admiralty jurisdiction " 'notwithstanding that . . . damage or injury be done or consummated on land.' " G.L. Br. 8 (quoting 46 U.S.C. App. § 740). And, taking its reading of the Extension Act to its logical conclusion, Great Lakes ultimately contends that the Act extends federal jurisdiction to any "case involving 'damage or injury to . . . property,' allegedly 'caused by a vessel' " (G.L. Br. 42 (quoting Section 740)), and does not require satisfaction of any nexus test, not even the one found in *Sisson v. Ruby*, 497 U.S. 358 (1990).

Two flaws lie at the core of Great Lakes' submission. First, the "plain language" of the Extension Act could not eliminate the requirement of a nexus to the federal interest in protecting maritime commerce; the scope of the Act is dependent on 28 U.S.C. § 1333, which itself contains a nexus requirement. Second, if the nexus test is to be applied with integrity, it should not be "irrelevant" that a case involves injuries to nonmaritime parties; the test for federal jurisdiction should be mindful of the impact on such parties and the States of extending maritime jurisdiction to such cases.

A. The Admiralty Extension Act Does Not Obviate The Need To Establish A Nexus To The Federal Interest In Protecting Maritime Commerce In Order To Assert Admiralty Jurisdiction.

When a case involves wrongful conduct on a vessel causing injury on navigable waters, it is now settled that such a maritime situs alone is insufficient to make the case one of "admiralty and maritime jurisdiction" under Section 1333; this Court has repeatedly rejected such a rigid locality test. Instead, the case must involve a "maritime tort" (*Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 268 (1972))—a tort with some relationship to the federal interest in protecting maritime commerce. See, *e.g.*, *Sisson*, 497 U.S. at 364 & n.2; *Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 673-75 & nn.4-5 (1982). While the language of Section 1333 nowhere refers to a nexus test, the Court has found a nexus requirement to be inherent in the concept of "admiralty and maritime jurisdiction," as we explain in our opening brief. See Chicago Br. 14, 17-21. Great Lakes' argument that the Extension Act is not similarly limited would mean that admiralty jurisdiction would be more expansive for land-based than for water-based injuries—a result that would be odd, to say the least. This Court should decline Great Lakes' invitation to create this anomaly—the Act does not convert every case of injury on land allegedly caused by a vessel on navigable waters into an admiralty action without regard to whether the case has a sufficient nexus to the federal interest in protecting maritime commerce.

As we explain in our opening brief, the purpose of the Extension Act was to alter the requirement that this Court had discerned in Section 1333 of an injury occurring on the water, but not otherwise to alter admiralty jurisdiction. See Chicago Br. 16-17, 38. The Extension Act states that "suit may be brought . . . according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water" (46 U.S.C. App. § 740), making quite clear that cases under the Act are governed by the same rules as for Section 1333 cases. And this makes sense, since the plain language of the Extension Act nowhere confers jurisdiction on district courts—that is done solely by Section 1333. The legislative history confirms Congress's intention to reach only causes of action that would have been within Section 1333 but for a nonmaritime situs: "Adoption of the bill will not create new causes of action. It merely specifically directs the courts to exercise the admiralty and maritime jurisdiction of the United States already conferred by article III, section 2 of the Constitution and already authorized by the Judiciary acts." S. Rep. No. 1593, 80th Cong., 2d Sess. 2 (1948); accord H.R. Rep. No. 1523, 90th Cong., 2d Sess. 3 (1948).

Thus the Extension Act cannot be read in isolation; it must be read in conjunction with Section 1333. As we explain above, that provision requires a nexus to the federal interest in maritime commerce. The Extension Act therefore does not abolish the nexus requirement and does not turn what would otherwise be nonmaritime torts into admiralty cases. Indeed, this Court has construed the Act to reach only torts "caused by a vessel admittedly within admiralty jurisdiction." *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 360 (1969). See also *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 209-12 (1971). Thus, although the Act repudiates the prior situs test—bringing within admiralty jurisdiction maritime actions regardless where injury is felt (subject to the limitation on remote claims we discuss below)—it nowhere eliminates the additional requirement of a maritime cause of action. And the Court has made clear that to be a maritime action, a case must have a sufficient nexus to the federal interest in protecting maritime commerce.

Three times since the enactment of the Extension Act, this Court has rejected the claim that Great Lakes makes here—that the Act brings into admiralty all cases of injury on land alleged to have been caused by a vessel on navigable water. Instead, the Court has looked to the strength of the relevant federal and state interests. In *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973), the Court held that Florida was not prevented from prosecuting ship owners under a statute governing liability for oil spills that damage the coast, rejecting an argument that the Extension Act meant that such claims fell within admiralty jurisdiction. The Court held that the Extension Act did not vest "the federal courts with exclusive jurisdiction to the exclusion of powers traditionally within the competence of the States" (*id.* at 341); and that the States' power to adjudicate the liability of vessels causing "sea-to-shore pollution . . . is not silently taken away from the States by the Admiralty Extension Act." *Id.* at 343. Weighing the pertinent state and federal interests the Court concluded

that there was no federal interest sufficient to deprive the States of their traditional power to protect their coasts. See *id.* at 342-44. Similarly, in *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960), the Court held that Detroit could prosecute ship owners under a local smoke abatement ordinance because Congress had expressed no federal interest in regulating this problem and the ordinance advanced a clear local interest. See *id.* at 444-48.

Great Lakes tries to dismiss these two cases as involving "what substantive law . . . to apply, and not what forum was proper" (G.L. Br. 33), but in both cases the Court held that claims arising from ship-to-shore injuries need not be brought in admiralty if they implicate insufficient federal interests, a conclusion directly at odds with Great Lakes' view of the Extension Act. These are not choice-of-law cases: such cases would hold that although the claim must be brought in admiralty, the admiralty court is free to apply state law. Instead, these are cases about what forum was proper; they held that such claims need not be brought in admiralty at all. In any event, the third case, *Victory Carriers*, cannot be distinguished that way; it was unquestionably an admiralty jurisdiction case. The Court held that Law's claim that he had been injured while working on a dock loading Victory Carriers' vessel was not within admiralty jurisdiction because of the traditional rule that "injuries on land are covered, for the most part, by state substantive law." 404 U.S. at 213. Because neither the vessel nor its appurtenances ever touched Law, the relationship between the injury and the vessel was too "attenuated" for the Extension Act to reach the case. *Ibid.*[1] These de-

[1] Great Lakes would distinguish *Victory Carriers* on the basis that that case was outside the scope of Extension Act jurisdiction because it involved an injury caused by pier-based equipment rather than an appurtenance of a vessel. See G.L. Br. 20-21. But the Court did not reject Law's claim because there was no causal relationship between his injury and the vessel—plainly there was one, since Law was injured when the vessel was being loaded and

cisions make clear that even in cases in which it is alleged that an injury on land was caused by a vessel on navigable water, there can be an insufficient nexus to federal interests to require the injured party to proceed in admiralty. And in none of these cases, of course, did the Court treat the fact of injury occurring on land as "irrelevant."

There is thus simply no basis for reading the Extension Act to confer federal jurisdiction over a nonmaritime tort, that is, a case arising from an injury inland that does not implicate the federal interest in protecting maritime commerce. The Act "extends" landward only the locality of admiralty jurisdiction. A case can satisfy the locality test if it falls within the terms of the Extension Act, but it still must satisfy the nexus test as well.[2] To hold that the Extension Act supplies admiralty jurisdiction even when a case bears no relationship to the federal interest in protecting maritime commerce would "divorce[] the jurisdictional inquiry from the purposes that support the exercise of jurisdiction" (*Sisson*, 497 U.S. at 364 n.2)—something this Court has refused to do even in cases construing Section 1333. Such an approach cannot possibly enjoy any more success under the Extension Act.[3]

---

alleged that the "negligence of Victory caused his injuries." 404 U.S. at 203. The Court's opinion never questioned the causal relation between the vessel and Law's injuries; rather the Court held that there was no Extension Act jurisdiction when the relation between the vessel and the injury is "attenuated." *Id.* at 213.

[2] The lower courts have uniformly held that Extension Act claims require a sufficient maritime nexus. See, *e.g.*, *Crotwell v. Hockman-Lewis, Ltd.*, 734, F.2d 767, 768 (11th Cir. 1984); *Sohyde Drilling & Marine Co. v. Coastal States Gas Producing Co.*, 644 F.2d 1132, 1135-36 (5th Cir.), cert. denied, 454 U.S. 1081 (1981).

[3] Perhaps recognizing that it would be untenable to use a nexus test under Section 1333 but not under the Extension Act, amicus Maritime Law Association of the United States urges the Court to repudiate the nexus test altogether and adopt a "modified situs test" under which admiralty jurisdiction would include "any wrong occurring on or caused by a vessel on navigable waters." M.L.A. Br. 9. This approach has been urged before but has never gained

B. The Determination Whether A Case Involving Nonmaritime Parties Satisfies The Nexus Requirement Should Be Guided By Preemption Jurisprudence.

Although the nexus requirement is common to Section 1333 and the Extension Act, we explain in our opening brief that the question what constitutes a sufficient nexus to the federal interest in protecting maritime commerce should be analyzed differently in cases involving land-based injuries to nonmaritime parties than in cases like *Sisson* involving only parties engaged in maritime activities. That is because cases involving injuries on navigable waters and parties engaged in maritime pursuits risk no federal preemption of traditional aspects of state tort law. But cases like this one—arising from injuries incurred inland and parties not engaged in maritime activities—

---

the support of more than two Justices. See 497 U.S. at 373-74 (Scalia, J., joined by White, J., concurring in the judgment). The Court rejected such an approach in *Foremost*, see 457 U.S. at 673-74, and again even more forcefully in *Sisson*, where the Court squarely held that "the purpose underlying the existence of federal maritime jurisdiction is the federal interest in the protection of maritime commerce, and . . . a case must implicate that interest to give rise to such jurisdiction." *Id.* at 364 n.2.

This holding was plainly correct; a situs test would sweep within federal jurisdiction a variety of cases that implicate no maritime interest and that for that reason should not be in federal court. See, *e.g.*, *Penton v. Pompano Construction Co.*, 976 F.2d 636 (11th Cir. 1992) (construction worker seeks recovery for injury caused by negligent operation of crane aboard stationary construction barge); *Watson on Behalf of Watson v. Massman Construction Co.*, 850 F.2d 219 (5th Cir. 1988) (worker on stationary construction barge seeks recovery for injuries caused by defective construction equipment); *Eagle-Picher Industries, Inc. v. United States*, 846 F.2d 888, 895-97 (3d Cir.) (asbestosis recovery sought by workers exposed while repairing vessels on water), cert. denied, 488 U.S. 965 (1988); *LaMontagne v. Craig*, 817 F.2d 556 (9th Cir. 1987) (per curiam) (recovery sought for defamatory message composed on and sent from ship); *Sohyde Drilling & Marine Co. v. Coastal States Gas Producing Co.*, 644 F.2d 1132 (5th Cir.) (recovery sought for damage to oil well caused by negligence of repair work undertaken from stationary barge), cert. denied, 454 U.S. 1081 (1981).

threaten to preempt state-law rights and defenses traditionally governed by state tort law. Thus, this case requires the same approach to determining whether a federal interest justifies displacing state law as in other types of preemption cases. See Chicago Br. 30-32.

Great Lakes complains that "[w]hether federal jurisdiction exists is an analytically separate question from what aspects of state law may or may not be pre-empted." G.L. Br. 32. But this is beside the point. However separate the questions, there is and should be a close relation between jurisdiction and preemption in admiralty law. That is because admiralty jurisdiction necessarily has preemptive consequences. While there is no preemption of aspects of state law not considered "characteristic features of the general maritime law" or necessary to "the proper harmony and uniformity of the law" (*American Dredging Co. v. Miller*, 113 S. Ct. 981, 985 (1994)), such as the doctrine of *forum non conveniens* considered in *American Dredging*, use of state law is forbidden when it "deprive[s] a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretive decisions of this Court." *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 410 (1953). Thus, as we explain in our opening brief, a court sitting in admiralty must employ substantive maritime law. See Chicago Br. 14-15, 26. And since application of substantive federal maritime law follows the assertion of admiralty jurisdiction as night follows day, the Court properly uses preemption concerns to inform its jurisdictional inquiry.

In *Victory Carriers*, the Court did just that: it refused to construe the Extension Act broadly because such a construction "would raise difficult questions concerning the extent to which state law would be displaced or pre-empted, and would furnish opportunity for circumventing state . . . statutes." 404 U.S. at 212. Precisely because extending admiralty jurisdiction inland threatens to federalize actions traditionally governed by state law, the Court concluded in *Victory Carriers*, and again in *Askew*, that it should "proceed with caution" when the

Extension Act is urged as a basis to enlarge federal jurisdiction past docks and piers. See 411 U.S. at 341; 404 U.S. at 212. And as we point out above, in both *Askew* and *Huron Portland Cement* the Court relied on its reluctance to preempt state law without sufficient justification to conclude that some cases of ship-to-shore injury need not be brought in admiralty.

Indeed, we thought it settled that federal preemption of the state substantive law is of jurisdictional significance. The Court has routinely used preemption analysis to determine if a state court may adjudicate tort liability in the face of a claim that such an adjudication would undermine a federal interest or policy.[4] The Court made explicit the jurisdictional significance of preemption in *International Longshoremen's Association v. Davis*, 476 U.S. 380 (1986). There the Court held that the union's argument that Davis's state tort action was preempted went to the state court's subject-matter jurisdiction, and was not a substantive defense that could be waived if not timely asserted. See *id.* at 387-93. Similarly, in *Williams v. Lee*, 358 U.S. 217 (1959), the Court held that the preemptive effect of federal Indian law precluded state courts from exercising jurisdiction over civil actions against Native Americans when the cause of action arises on a reservation. And in *Kalb v. Feuerstein*, 308 U.S. 433 (1940), the Court held that the preemptive effect of federal bankruptcy law deprived state courts of subject-matter jurisdiction to hear foreclosure actions concerning property subject to the bankruptcy action; preemption was not a mere substantive defense that could be waived. See *id.* at 438-40. If the determination whether a state court has jurisdiction to adjudicate liability under state law is controlled by preemption analysis, there is no reason why the determination whether a federal court has jurisdiction to displace state law by hearing an admiralty action should not be similarly governed.

---

[4] See, *e.g.*, *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992); *Ingersoll-Rand Co. v. McLendon*, 498 U.S. 133 (1990); *English v. General Electric Co.*, 496 U.S. 72 (1990); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

Great Lakes also resists our preemption analysis by arguing that "the test for admiralty jurisdiction articulated by this Court in *Sisson* already takes into account federalism concerns." G.L. Br. 35. Great Lakes is not well situated to make this argument. Great Lakes believes that the fact of damage on land is "irrelevant" to the jurisdictional analysis (G.L. Br. 8)—a position that concededly gives no weight to the legitimate interests of land-based parties or the traditional State power to control the liability rules, including governmental tort immunities, for land-based parties not engaged in maritime activities. As we explain in our opening brief, Great Lakes' reliance on the Extension Act implicates these serious federalism concerns. See Chicago Br. 23-25.

More important, *Sisson* did not involve an effort to extend admiralty jurisdiction inland to reach parties and property not engaged in maritime activities; hence the Court did not craft its test with the problems of extending federal jurisdiction inland in mind. *Sisson* involved only boat and marina owners—parties engaged in maritime activities—and the Court limited its holding to "cases in which all of the relevant entities are engaged in similar types of activity." 497 U.S. at 366 n.4. This is not such a case; Grubart and the other state-court plaintiffs were engaged in no maritime activities, and while the City may engage in some activities that may be considered maritime (such as maintaining bridges, see M.L.A. Br. 19-20), here the City is sued for its management of an underground tunnel, hardly a maritime activity. In this case, federal law requires an approach more sensitive than *Sisson* to the legitimate state interests in adequately compensating—or immunizing when warranted—nonmaritime parties. Because "state law has traditionally governed" the right of land-based parties (*Victory Carriers*, 404 U.S. at 212), the Court should "proceed with caution" (*ibid.*) that is unnecessary in a case like *Sisson*.

Great Lakes criticizes the test that we have derived from the Court's preemption jurisprudence as "vague,

manipulable and imprecise." G.L. Br. 39. But this test has not proven so outside the admiralty context; in other cases in which a party seeks to use federal law to preempt state tort law the Court has asked whether preserving state tort law undermines federal interests. *E.g.*, *English v. General Electric Co.*, 496 U.S. 72 (1990). Nothing about this test makes it inappropriate for use at the jurisdictional stage; indeed, as we explain above, the Court has employed preemption analysis to determine jurisdiction in a variety of contexts. The three specific questions we suggest—whether there is evidence of a federal interest in supplying the rules of decision for this type of case; whether there is a risk of conflicting, uncertain, or nonuniform rules for those engaged in maritime commerce; and whether preserving state jurisdiction would otherwise burden maritime commerce (see Chicago Br. 33)—are standard preemption fare. The *Sisson* test itself is hardly more clear-cut: defining the "general features" of the "incident" and "activity giving rise to the incident" (497 U.S. at 363-64) often cannot be easily or precisely done. Indeed, even Great Lakes' amicus urges the Court to abandon the *Sisson* test because it is too often "misinterpreted, misapplied or ignored." M.L.A. Br. 12. In contrast, our test—because it is derived from preemption jurisprudence—will be familiar to this Court and the lower courts; it will, if anything, enhance clarity and predictability in this area of the law.

Our opening brief explained why, applying traditional preemption principles in the admiralty context, there is no sufficient federal interest in adjudicating a case like this, where a pile-driving contractor, working from a stationary platform, allegedly damaged an underground structure and flooded land-based businesses. The tortious conduct alleged is not subject to federal regulation; state-court adjudication would not subject Great Lakes to potentially conflicting, nonuniform, or uncertain obligations; and state litigation would not otherwise burden maritime commerce. See Chicago Br. 33-38. Great Lakes takes issue with none of this. It comes closest to

meeting our arguments by its claim that there is a federal interest in adjudicating this case because the flood resulted in the closure of the Chicago River. G.L. Br. 23-24. But this case presents no claim arising from that disruption of maritime commerce—Great Lakes' admiralty petition does not embrace any claim by an entity engaged in maritime pursuits that was injured when the River was closed. Thus there is no federal interest here premised on the need to maintain the uninterrupted use of a navigable river for those engaged in maritime activities.[5] Instead, this case requires a court to define the standards for safeguarding underground structures when driving piles through "[river]bed and subsoil . . . , and admiralty law [i]s obviously unsuited to that task." *Rodrigue*, 395 U.S. at 365 (footnote omitted). Certainly the federal interest in adjudicating Great Lakes' liability is no stronger than it was in cases involving oil spills, air pollution, and pier-based injuries to dockworkers—all of which have been considered and rejected as a basis for admiralty jurisdiction in *Askew*, *Huron Portland Cement*, and *Victory Carriers*.[6]

---

[5] Even the hypothetical existence of claims arising from the closure of the River supplies no federal interest in protecting such claimants, or even in protecting Great Lakes from such claims, since those who suffered economic losses resulting from delays occasioned by the River's closure cannot recover either under admiralty law (see *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927)) or Illinois law (see *Dundee Cement Co. v. Chemical Laboratories, Inc.*, 712 F.2d 1166 (7th Cir. 1983)).

[6] Great Lakes also claims that our test is difficult to apply when an incident gives rise to both water- and land-based injuries. See G.L. Br. 37-38. But preemption analysis will have little trouble with such cases—when, as here, they arise from activities on stationary work platforms, there will rarely be a federal interest present sufficient to warrant admiralty jurisdiction. See, *e.g.*, *Drake v. Raymark Industries, Inc.*, 772 F.2d 1007, 1015-19 (1st Cir. 1985) (asbestosis claims of workers exposed while repairing vessels both ashore and on water not within admiralty because they do not implicate federal interests), cert. denied, 476 U.S. 1126 (1986). When, however, claims implicate federal interests in protecting maritime commerce, preemption analysis will support federal jurisdiction. See, *e.g.*, *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1031-32 (5th Cir. 1985) (en banc) (collision between ships causing damage to both ships and to shoreside property within admiralty jurisdiction because of the federal interest in enforcing uniform rules for navigation), cert. denied, 477 U.S. 903 (1986).

In a final effort to avoid explaining why the flooding of downtown basements is a concern of admiralty, Great Lakes presents an alternate ground for affirming the judgment below that does not depend on the existence of admiralty jurisdiction. Relying on *Richardson v. Harmon*, 222 U.S. 96 (1911), Great Lakes argues that the Limitation of Vessel Owners' Liability Act is "an independent basis for federal court jurisdiction" over this action. G.L. Br. 44. The district court rejected this argument (Pet. App. 39a-40a), which Great Lakes had confined to a footnote. The court of appeals reversed on other grounds, thus finding it unnecessary to reach the issue (Pet. App. 11a n.8), which was again confined to a footnote.

Great Lakes' position is difficult to square with the Limitation Act itself, since a 1936 amendment to the Act provides that the owner of a vessel may seek limitation of liability in a "district court of the United States of competent jurisdiction." 46 U.S.C. App. § 185. This is at best a strange phrasing for a grant of jurisdiction; the plain language appears to require some jurisdictional grant external to the Limitation Act itself. Indeed every circuit to decide this question in recent years has held that the Limitation Act reaches only cases otherwise within admiralty jurisdiction.[7] But this Court should not decide this issue now. Not only did the court of appeals fail to reach it, but that court might well conclude that Great Lakes has waived it. See, *e.g.*, *Colburn v. Trustees*

---

[7] See *Guillory v. Outboard Motor Corp.*, 956 F.2d 114, 115 (5th Cir. 1992) (per curiam); *David Wright Charter Service v. Wright*, 925 F.2d 783, 785 (4th Cir. 1991) (per curiam); *Three Buoys Houseboat Vacations U.S.A., Ltd. v. Morts*, 921 F.2d 775, 779-80 (8th Cir. 1990), cert. denied, 112 S. Ct. 272 (1991); *Lewis Charters, Inc. v. Huckins Yacht Corp.*, 871 F.2d 1046, 1052-54 (11th Cir. 1989); *In re Complaint of Sisson*, 867 F.2d 341, 348-50 (7th Cir. 1989), rev'd on other grounds *sub nom. Sisson v. Ruby*, 497 U.S. 358 (1990). This was also the Solicitor General's conclusion in an amicus brief in *Sisson*. See U.S. Br. 10-28, *Sisson v. Ruby*.

of Indiana University, 973 F.2d 581, 593 (7th Cir. 1992). If the Court reverses, it should follow its usual practice and remand the case for the court of appeals' consideration, in the first instance, of the Limitation Act issues and whether they have been preserved.[8]

II. THE ADMIRALTY EXTENSION ACT DOES NOT CONFER JURISDICTION OVER INJURIES REMOTE IN TIME AND PLACE FROM CONDUCT ON NAVIGABLE WATERS.

In our opening brief, we explained why the court of appeals' construction of the Admiralty Extension Act—as extending admiralty jurisdiction to any injury on land caused by wrongful conduct on a vessel in navigable water—is inconsistent with *Sisson*. There the Court wrote that courts should not have to "decide to some extent the merits of the causation issue to answer the legally and analytically antecedent jurisdictional question." 497 U.S. at 365. This case highlights the anomalous construction of the Act that Great Lakes urges. In Great Lakes' view the Act extends even to cases in which it is ultimately proven at trial that a vessel did not cause damage ashore—the very fact that, in Great Lakes' view, serves as the basis for Extension Act jurisdiction. Indeed, Great Lakes' construction allows a party seeking to invoke federal jurisdiction on the causation language of the Extension Act to destroy federal jurisdiction by disproving causation. To avoid these anomalies, we urge that the Act be construed so that courts need not address difficult questions of proximate causation in order to determine whether they have jurisdiction. When an injury ashore is remote in time and place from conduct occurring on navigable waters, the injury should not be deemed "caused by" conduct on the water within the meaning of the Act. See Chicago Br. 42-45.

---

[8] See, *e.g.*, *International Brotherhood of Electrical Workers v. Hechler*, 481 U.S. 851, 864-65 (1987); *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 568 (1981); *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 181-82 (1976).

While Great Lakes claims to rely on the "clarity of the language of the Extension Act" (G.L. Br. 21), this Court has never read the Act as Great Lakes does. In *Victory Carriers*, for example, the Court recognized the need to limit claims of causation under the Act. The Court rejected Law's claim because "the typical elements of a maritime cause of action [we]re particularly attenuated" (404 U.S. at 213): "Law was not injured by equipment that was part of the ship's usual gear or that was stored on board . . . and the accident did not occur aboard ship or on the gangplank" (*id.* at 213-14). To permit this type of claim to go forward therefore "would raise a host of new problems as to the standards for and limitations on the applicability of maritime law to accidents on land." *Id.* at 214 (footnote omitted). The Court concluded that the Extension Act does not reach injuries to persons not on a vessel or its gangplank unless they are physically injured by the vessel or its appurtenances; more attenuated claims of causation will not do. See *id.* at 212-14 & n.14.

Victory Carriers describes one prong of the remoteness test we advocate here: to be within admiralty jurisdiction, the injury must not occur at a place farther from navigable waters than the reach of the vessel, its appurtenances, or cargo. *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206 (1963), supplies the other: land-based injury must occur at a time reasonably contemporaneous with negligent conduct on navigable waters. See *id.* at 210. Although the language regarding remoteness may have been unnecessary to the decision in *Victory Carriers*, and plainly was dicta in *Gutierrez*, both cases correctly anticipate the serious problems of federalism and practical administration that follow if federal courts entertain admiralty cases based on an attenuated relation between conduct on water and injury on land.[9] Thus, we urge this remoteness test as a basis for the holding in this case.

---

[9] The lower courts have read *Gutierrez* and *Victory Carriers* to exclude injuries on land if they are too remote from conduct on a vessel in navigable waters. See, *e.g.*, *Margin v. Sea-Land Services*,

Great Lakes argues that no true dispute about causation is present here because the Court should rely on the allegations of causation in the pleadings: "the appropriate inquiry is whether the claims prompting the vessel owner to seek limitation of liability allege that his vessel caused damage or injury." G.L. Br. 16. But Great Lakes also acknowledges that a court cannot confine its jurisdictional inquiry to the pleadings when facts essential to jurisdiction are disputed; the case on which it principally relies, *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987), makes that clear. *Gwaltney* involved the jurisdictional requirement that a plaintiff establish standing to bring suit; the Court there held that good-faith allegations of standing, while enough to allow a case to go forward, must be proven if they are contested. *Id.* at 65-66. The Court amplified on this rule in *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992): "Since [factual allegations establishing standing] are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Id.* at 2136. Thus, when factual allegations necessary to confer jurisdiction on a federal court are disputed, they must be proven at trial.

Here, as we point out in our opening brief, proximate causation is hotly contested—in fact Great Lakes denies that its vessels caused damage ashore. Thus, this issue will have to be tried. The problem here, which Great Lakes does not address, is that under *Crowell v. Benson*, 285 U.S. 22 (1932), if the trier of fact finds that no conduct on navigable waters caused the injuries for which recovery is sought, the federal court will have no authority to adjudicate in admiralty what would otherwise

Inc., 812 F.2d 973 (5th Cir. 1987); *Crotwell v. Hackman-Lewis Ltd.*, 734 F.2d 767, 769 (11th Cir. 1984); *Pryor v. American President Lines*, 520 F.2d 974, 978-80 (4th Cir. 1975), cert. denied, 423 U.S. 1055 (1976).

be a state-law case. Just as *Gwaltney* and *Defenders of Wildlife* read Article III to require proof of the jurisdictional facts alleged to establish standing, *Crowell* requires proof of jurisdictional facts to support Article III admiralty jurisdiction. See 285 U.S. at 54-56. Thus, if Great Lakes prevails at trial on causation, it will destroy the jurisdictional and constitutional basis for hearing this case in federal court. Great Lakes' construction of the Act—that a federal court cannot authoritatively ascertain its jurisdiction until after trial on the merits—is the very result that *Sisson* counsels to avoid and should for that reason be rejected.[10]

Our construction of the phrase "caused by" in the Extension Act, by excluding remote injuries, minimizes this problem. That construction is supported not only by *Sisson*, *Victory Carriers*, and *Gutierrez*, but also by *Askew* and *Huron Portland Cement*. In those cases, too, the Court rejected an expansion of federal jurisdiction to every injury ashore allegedly caused by a vessel on navigable waters. That rejection makes good sense in light of the problems of federalism and pragmatic application that would be created by an expansive reading of the phrase "caused by" in the Act.

Great Lakes misapplies our test to several hypothetical situations in an effort to discredit it. Each of the hypotheticals offered is within the scope of Extension Act jurisdiction under the test we advocate, no less than under Great Lakes' test. As we explain in our opening brief, we read *Gutierrez* and the other Extension Act precedents to find claims of causation too attenuated when the injury is remote in both time and place from wrongful conduct on a vessel. See Chicago Br. 44-45. On the facts hypothesized by Great Lakes—a vessel strikes

[10] Great Lakes correctly notes (G.L. Br. 15-16) that it may plead in the alternative—denying proximate causation yet seeking limited liability. See Fed. R. Civ. P. 8; Fed. R. Civ. P. Supp. F(2). Our point is not that Great Lakes has pled improperly; rather it is that admiralty jurisdiction cannot be made to depend on the merits of proximate causation.

a levee causing flooding downstream, and a fire spreads inland from navigable water (see G.L. Br. 23)—the injury is remote in place but not time. Hence, these are admiralty cases under the test we urge. These manufactured cases, however, say nothing about the propriety of admiralty jurisdiction in this case. Here the injury on land is remote in both time and place from Great Lakes' pile driving on navigable water. Such a case stretches the phrase "caused by" too far to come within admiralty jurisdiction.

III. THE *SISSON* TEST DOES NOT SUPPLY ADMIRALTY JURISDICTION HERE.

In our opening brief, we remain faithful to *Sisson*'s direction that courts applying the test for admiralty jurisdiction should not attempt to identify the underlying "source" or "cause" of the injury for which recovery is sought. 497 U.S. at 363, 365. In this case, our characterization of the "incident"—the flooding of building basements in the Chicago Loop—is the only one that avoids inquiry into disputed questions of causation. The flooding is what harmed the plaintiffs; all other proffered versions focus on what may or may not have set in motion the chain of events culminating in harm to them. Just as the relevant incident in *Sisson* was the fire and not its cause—the defective washer/dryer—here the incident is the flood, not its cause. Similarly, the only proper characterization of the "activity giving rise to the incident" is the City's management of the tunnel—it was the damaged tunnel that allowed water to reach and thus injure plaintiffs. Again versions that focus on what may have caused the damage to the tunnel are not appropriate.

This focus on the merits of proximate causation is just one of the problems with Great Lakes' submission that "[t]he incident is the alleged negligent replacement of the dolphins, and the activity that gave rise to that is Great Lakes' maritime repair work on navigable water." G.L. Br. 30. The other problem, of course, is that Great Lakes' version telescopes into one thing what *Sisson* describes as two separate things, one preceding the other—

an "incident" (497 U.S. at 363) and an "activity giving rise to the incident" (*id.* at 364).

Great Lakes rejects our characterization of the incident and activity for two reasons. First, it claims that the Extension Act makes damage on land irrelevant to jurisdictional analysis. See G.L. Br. 24-25, 29-30. We explain above that this Court has rejected the claim that the existence of injury ashore is irrelevant to jurisdictional analysis at least three times. See *supra* at 4-6. Second, Great Lakes argues that *Sisson* does not define the relevant incident in terms of the "specific damage [that] was caused." G.L. Br. 25. But *Sisson* did focus on the event that damaged the plaintiff's property—"a fire on a vessel docked at a marina in navigable waters" (497 U.S. at 363)—rather than on the wrongful act that set in motion a chain of events culminating in the fire. Here, the event that damaged plaintiffs' property was the flooding of their basements; Great Lakes' pile driving was simply the wrongful act that led to that flood.

Great Lakes' main response to our interpretation of *Sisson* is to offer freakish hypotheticals in support of its argument that a test that disclaims inquiry into what caused injuries on land leads to odd results. For example, Great Lakes is correct that, in our view, there would be federal jurisdiction under *Sisson* if negligently placed pilings come loose and block a navigable channel, but not if the pilings block a pipe and flood a building inland. See G.L. Br. 24. Similarly, there is no threat to maritime commerce, and thus admiralty jurisdiction, if embers from a fire aboard the yacht in *Sisson* had been borne inland by the wind to start a fire. And our reading of *Sisson* forecloses admiralty jurisdiction if a vessel's allision with a bridge somehow cracks an underground tunnel and eventually causes flooding inland. See G.L. Br. 30. These results are required in order to adhere to *Sisson*'s admonition to separate the jurisdictional inquiry from the merits of proximate causation.

Perhaps some of Great Lakes' hypotheticals—such as the vessel that allides with a bridge causing a flood on

land—should be within admiralty jurisdiction. If that is so, the problem lies not in any flaw in our reading of *Sisson*, but in applying *Sisson* to injuries on land. It should come as no surprise that the *Sisson* test does not work well in such cases: the test was crafted for cases in which all relevant entities are engaged in maritime activities on navigable water, not cases where questions arise about how conduct on the water affects events ashore. If anything, Great Lakes' hypotheticals demonstrate how unsatisfactory the *Sisson* test is in cases involving land-based injuries and parties. For this reason, we urge the Court to use a different jurisdictional test for such cases.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

THEODORE R. TETZLAFF
RICHARD C. BOLLOW
RUSS M. STROBEL
JEFFREY T. SHAW
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

MICHAEL F. STURLEY
727 East 26th Street
Austin, Texas 78795
(512) 471-6318

SUSAN S. SHER
Corporation Counsel of
the City of Chicago
LAWRENCE ROSENTHAL *
Deputy Corporation Counsel
BENNA RUTH SOLOMON
Chief Assistant Corporation
Counsel
BOBBIE MCGEE GREGG
Chief Assistant Corporation
Counsel
STUART D. FULLERTON
Assistant Corporation Counsel
Room 610 City Hall
Chicago, Illinois 60602
(312) 744-5337
Attorneys for Petitioner
City of Chicago

* Counsel of Record

July 13, 1994